U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAY 10 2005
SRC 00 211 52013

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, for abandonment. The director reopened the matter and subsequently denied the petition on its merits. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion.[1] The motion will be granted, the previous decision by the AAO will be affirmed and the petition will be denied.

The petitioner seeks classification pursuant to section 203(b)(2)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(B)(ii), as an alien physician. The petitioner asserts that he is an alien physician who has agreed to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals. The director found that the petitioner did not work in a designated area at the time of filing and that the petitioner had not submitted an attestation from a government agency dated within six months prior to the filing date of the petition. On appeal, the AAO withdrew the director's finding that the attestation from a government agency needed to be dated within six months prior to the filing date of the petition when the regulations stating that requirement were issued after the petition was filed. The AAO upheld the director's determination that the shortage area in which the petitioner was working had to be so designated as of the date of filing. The AAO acknowledged that the area was redesignated after the date of filing, but noted that the petitioner had filed another petition after that date, which was approved.

On motion, counsel asserts that the AAO wrongly relied on 8 C.F.R. § 103.2(b)(12) and *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Counsel asserts that approval of the petition conforms with the spirit of the law and will allow the petitioner's daughter to adjust status with him, since she is too old to derive benefits from his subsequent approved petition.

While situations beyond the petitioner's control have had unfortunate consequences for his daughter, the only issue before us is the petitioner's eligibility. We will discuss counsel's assertions relating to this issue below.

Section 203(b) of the Act, as amended, provides:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> (B)(i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's

[1] Counsel requests that the motion, filed with a single fee, be considered as a simultaneous motion before the director and the AAO, but provides no legal basis for such a joint, simultaneous motion. As the AAO's decision is the most recent, we will consider the request as a motion to reconsider the AAO's decision.

services in the sciences, arts, professions, or business be sought by an employer in the United States.

(ii)(I) The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if--

(aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and

(bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

The regulation at 8 C.F.R. § 204.12(c) provides that a petitioner seeking a waiver as a physician intending to work in an underserved area must submit the following evidence:

(1)(i) If the physician will be an employee, a full-time employment contract for the required period of clinical medical practice, or an employment commitment letter from a VA facility. The contract or letter must have been issued and dated within 6 months prior to the date the petition is filed.

(ii) If the physician will establish his or her own practice, the physician's sworn statement committing to the full-time practice of clinical medicine for the required period, and describing the steps the physician has taken or intends to actually take to establish the practice.

(2) Evidence that the physician will provide full-time clinical medical service:

(i) In a geographical area or areas designated by the Secretary of HHS as having a shortage of health care professionals and in a medical specialty that is within the scope of the Secretary's designation for the geographical area or areas; or

(ii) In a facility under the jurisdiction of the Secretary of VA.

(3) A letter (issued and dated within 6 months prior to the date on which the petition is filed) from a Federal agency or from the department of public health (or equivalent) of a State or territory of the United States or the District of Columbia, attesting that the alien physician's work is or will be in the public interest.

(i) An attestation from a Federal agency must reflect the agency's knowledge of the alien's qualifications and the agency's background in making determinations on matters involving medical affairs so as to substantiate the finding that the alien's work is or will be in the public interest.

(ii) An attestation from the public health department of a State, territory, or the District of Columbia must reflect that the agency has jurisdiction over the place where the alien physician intends to practice clinical medicine. If the alien physician intends to practice clinical medicine in more than one underserved area, attestations from each intended area of practice must be included.

(4) Evidence that the alien physician meets the admissibility requirements established by section 212(a)(5)(B) of the Act.

(5) Evidence of the Service-issued waivers, if applicable, of the requirements of sections 212(e) of the Act, if the alien physician has been a J-1 nonimmigrant receiving medical training within the United States.

Although the facts were set forth in the AAO's previous decision, they bear repeating. On October 8, 1996, Spring Hill Medical Center filed a petition in behalf of the current self-petitioner. The petition sought the same classification and a waiver of the job offer requirement in the national interest pursuant to section 203(b)(2)(B) of the Act. The center was located in Hernando County, Florida, designated as an underserved area at the time. The Director, Vermont Service Center, approved the petition on October 10, 1995. On August 28, 2001, the Director, Tampa District Office, issued a notice of automatic revocation based on the termination of Spring Hill Medical Center's business. That decision is not before us on appeal. The petitioner continued to work in Hernando County on a J-1 nonimmigrant visa, obtaining a waiver of that visa's two-year foreign residence requirements in 1996 and entering the United States on an H1-B nonimmigrant visa on February 20, 1997. In May 1997, Hernando County lost its designation as a shortage area. In 1999, Congress amended section 203(b)(2) of the Act to include subparagraph (ii), providing for national interest waivers of the job offer requirement for certain alien physicians. On June 26, 2000, the petitioner filed the instant petition pursuant to section 203(b)(2)(B)(ii) of the Act. On September 6, 2000, legacy Immigration and Naturalization Service (INS), now Citizenship and Immigration Services (CIS), issued interim regulations to implement the statutory amendment. The regulations went into effect on October 6, 2000.

In response to the director's request for evidence that Hernando County was designated as a shortage area, counsel conceded that the area of intended practice "was not underserved at the time of filing this Petition" but was redesignated in February 2002. Counsel asserted that the area was designated at the time the previous petition was filed and quoted the following from 65 Fed. Reg. 53892 (September 6, 2000):

> The interim rule does not require that a physician relocate to another underserved area should the area the physician is practicing full-time clinical medicine lose its designation as an underserved area. The purpose of such a designation is to foster a greater physician presence in underserved areas. The Service believed one of the desired results of the statutory amendment is for physicians to take up residency in these areas and become integral parts of the community. Once an area is no longer designated as an underserved area, however, the Service

> can no longer grant national interest waivers for physicians to practice in that area (other than for physicians who will work in a VA facility).

The director concluded that the prior petition did not relieve the petitioner from establishing that he intended to work in a designated area at the time of filing. On appeal, counsel reiterated his previous arguments.

The AAO held that the petitioner must establish that he intended to work in a designated area at the time of filing, citing 8 C.F.R. § 103.2(b)(12) and *Matter of Katigbak,* 14 I&N Dec. at 49. The AAO found that the most reasonable interpretation of the provision in the Federal Register quoted above is that it relates to an alien physician working in an area that loses its designated status after the date of filing.

On motion, counsel asserts that the petitioner's service was responsible for Hernando County losing its designation and notes that it is now redesignated. Yet, subsequently, counsel asserts that the redesignation was due to the relocation "of many physicians from Hernando County." Counsel further asserts that 8 C.F.R. § 103.2(b)(12) and *Matter of Katigbak,* 14 I&N Dec. at 49 are not proper authority for the AAO's conclusions. Specifically, counsel asserts that 8 C.F.R. § 103.2(b)(12) "is a general statement with no detailed description of eligibility requirements." In addition, counsel asserts that *Matter of Katigbak,* 14 I&N Dec. at 49, dealt with academic qualifications, which the instant petitioner had at the time of filing. Finally, counsel asserts that the regulations could not anticipate every situation, and that the petitioner's situation is unique and in compliance with the controlling statute. Counsel references a comment on the regulations by the American Immigration Lawyers Association (AILA), but does not explain how this comment is binding on us.

Counsel is not persuasive. The record lacks evidence that the petitioner was solely responsible for Hernando County losing its designated status. Regardless, Hernando County lost its designated status in May 1997, three months after the petitioner entered the United States as an H1-B nonimmigrant[2] but more than two years prior to the enactment of the law under which the petitioner now seeks classification. At the time the law was passed and the time when the petitioner filed the instant petition, Hernando County was not designated as an underserved area.

Contrary to counsel's assertion that the regulations do not anticipate a similar situation, the commentary to the regulations does address the situation where the location of the employment loses its designation as underserved. While the commentary does state that the physician need not relocate, it also states that when an area loses its designation, CIS "can no longer grant national interest waivers for physicians to practice in that area (other than for physicians who will work in a VA facility)." Thus, while a physician whose petition is approved but who has yet to complete his five years of employment need not relocate if his location loses its designation, the same is not true for physicians who have yet to file a petition and arguably even for those who have filed but have not yet been approved. Thus, that the county was designated prior to May 1997 is not a basis for concluding that the petitioner's instant petition, filed in 2002, was based on an intent to work in an underserved area.

Regarding the county's redesignation in 2002, we find that 8 C.F.R. § 103.2(b)(12) and *Matter of Katigbak,* 14 I&N Dec. at 49 are relevant. Eligibility for the classification sought includes practicing in an underserved area as designated by HHS. The regulation at 8 C.F.R. § 103.2(b)(12) provides that any response to a request for

---

[2] The petitioner cannot include any employment performed while in status as a J-1 nonimmigrant. 8 C.F.R. §§ 245.18(e)(2), (3).

additional evidence must "establish filing eligibility at the time the application or petition was filed." The general nature of this provision does not diminish its relevance; rather, it suggests this regulation covers every element of eligibility. In addition, *Matter of Katigbak* may have involved academic credentials, but it stands for the general proposition that an alien must be "must be qualified at the time the petition is filed with this Service if a priority date for visa issuance is to be established." *Matter of Great Wall,* 16 I&N Dec. 142 (Acting Reg. Comm. 1977)(extending the holding in *Matter of Katigbak* to the issue of ability to pay). Thus, the county's redesignation after the date of filing is not evidence of the petitioner's eligibility as of the date of filing.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of January 3, 2005 is affirmed. The petition is denied.